had died of injuries caused by a fire she had started, brought an action against the hospital which treated the decedent. Plaintiff alleged that the hospital failed to provide the decedent with proper treatment, ignored warnings of her deteriorating mental condition, and failed to have the decedent committed as an inpatient. Specifically, plaintiff alleged that the hospital did nothing to follow-up on the decedent's failure to attend all of her court-ordered mental health care appointments, even though the hospital knew that the decedent was not taking her medication, had a breakdown, was becoming manic and walking around at night, had left a dinner burn in the oven, and was chain smoking. The hospital had also been advised that there were cigarette burns on the couch, although it did not know when the burns were made.

The court found that although the hospital failed to promptly address the decedent's missed appointment, when the missed appointment was brought to the attention of the hospital, its staff sought to reschedule the appointment within a week. Further, the hospital was never informed that the decedent was violent or dangerous to herself or others. The court further found that the hospital believed that there was insufficient time to attempt an involuntary inpatient commitment, that a petition for an emergency commitment was insupportable and that there was insufficient evidence to establish that the decedent was a clear and present danger to herself or others. The *Albright* court found that far from ignoring the decedent, the hospital solicited information concerning her condition and exercised its judgment as to what course of action was appropriate at that time. Based upon the information in the possession of the hospital, which was devoid of any evidence that the decedent presented a clear

and present danger to herself or others due to her mental condition or smoking habits, and in light of the applicable statutory requirements, the court found that the conduct of and the judgment exercised by the hospital did not rise to the level of gross negligence. The Pennsylvania Supreme Court affirmed.

As in *Albright, supra*, the trial court properly found that petitioner failed to meet his burden of proving that respondents engaged in willful misconduct or acted in a grossly negligent manner in the treatment of the decedent. The evidence, which was not contradicted, shows that on June 10, 1993, the decedent contacted Dr. Nicklin's office and informed his staff that she had swallowed 60 Tylenol and that she was told to go to Pennsylvania Hospital. (R.2715) While in the Emergency Department she denied suicidal ideation and was assessed as not being in acute medical danger. In fact, her Tylenol level was zero. Because her liver function studies showed some abnormalities, she was admitted to the hospital for observation. (R.2716-2718) Dr. Nicklin evaluated the decedent in the hospital on June 11, 1993. The decedent told him that she sought medical help because she thought about her infant daughter and decided she wanted to live. (R.3198-3199) The decedent advised the hospital's nurses that she didn't want to die and questioned the nurses about the effects of the overdose, expressing concern about her slow improvement. (R.2721-2722) Dr. Nicklin requested a psychiatric consultation. (R.3199)

A psychiatric consult, which included a suicide assessment, was conducted on June 11, 1993 by a psychiatrist. (R.3201) The decedent denied current suicidal ideation. It was determined by the psychiatrist that the

decedent was free of suicidal ideation and was an appropriate candidate for outpatient treatment. (R.3201)

On June 12, 1993, the decedent was seen by Carla Jardim, M.D., an internist associated with University City Family Medicine. Dr. Jardim found the decedent to be ready for discharge from a medical standpoint. (R.3200) The decedent was discharged on June 12, 1993 with instructions to follow-up with the Counseling Program and Dr. Nicklin. (R.2724-2725)

The decedent did not attend outpatient counseling. (SRR.24-25) She did not contact Dr. Nicklin or University City Family Medicine. Approximately three weeks after her discharge, on July 4, 1993, she was found dead at her home, having hanged herself. (R.2726) Cocaine, ethanol and narcotics were present on toxicological analysis. (R.2727)

Viewing the evidence in the light most favorable to the petitioner, the trial court properly found that no reasonable jury could conclude that the behavior of Dr. Nicklin and University City Family Medicine was flagrant, or that it grossly deviated from the ordinary standard of care. To the contrary, the evidence indicated that Dr. Nicklin timely referred the decedent to the hospital, that he timely obtained a psychiatric consult, which included a suicide risk assessment, and that he reasonably relied upon the opinion of the psychiatrist that the decedent was free of suicidal ideation and was a candidate for out-patient counseling. There was no evidence to support petitioner's allegation that the decedent sought and was refused treatment from Dr. Nicklin and/or University City Family Medicine between June 12, 1993 to July 4, 1993 or that Dr. Nicklin and/or University City Family Medicine

was ever informed of a change in the decedent's mental status following her discharge. Since the case was entirely free from doubt, the trial court did not err in granting respondents' Motion for Summary Judgment.

After the April 26, 2002 hearing on respondents' Motions for Summary Judgment, and immediately prior to the June 11, 2002 repeat hearing necessitated by the malfunctioning court reporting machine, petitioner, for the first time, produced an unsigned preliminary report authored by Dr. Bursztjan. (SRR.2-9) In his report, Dr. Bursztjan, expresses the opinion that Dr. Nicklin, a family practitioner, breached the standards of "psychiatric care" and that his treatment decisions were "likely" influenced by the health maintenance organization. (SRR.5, 9)

The trial court properly found that the unsigned, preliminary report of Dr. Bursztjan was untimely and insufficient as a matter of law to create a genuine issue of material fact. Pennsylvania Rule of Civil Procedure No. 4003.5., which governs the discovery of expert testimony, mandates that an expert report be signed by the expert. The report of Dr. Bursztjan was not only not signed, but was not even a final report, having been qualified as "preliminary." (SRR.9) Since Dr. Bursztjan's report was not signed and the opinions expressed therein were preliminary and subject to change, the trial court properly found that Dr. Bursztjan's opinion was not expressed within a reasonable degree of medical certainty.

B. Petitioner failed to articulate genuine issues of material fact with respect to the issue of whether Dr. Nicklin and University City Family Medicine's care and treatment of the decedent was influenced by financial incentives allegedly provided by her health maintenance organization.

The admission of expert testimony is within the discretion of the trial court. *Duquesne Light v. Woodland Hills School Dist.*, 700 A. 2d 1038, 1047 (Pa. Commw. 1997). In order for expert testimony to be admissible, the party seeking to offer that testimony must provide an adequate foundation for doing so. *Commonwealth v. Khamphouseane*, 434 Pa. Super. 93, 642 A.2d 490, appeal denied, 538 Pa. 666, 649 A.3d 669 (1994). A party does not lay an adequate foundation for expert testimony simply by presenting the testimony of its witnesses that he or she believes a particular proposition to be true based upon his or her own personal views and observations. *Commonwealth v. Appollo*, 412 Pa. Super. 453, 603 A.2d 1023, appeal denied, 531 Pa. 650, 613 A.2d 556 (1992). Stated another way, expert testimony is incompetent and may not be admitted into evidence if the expert's opinion is based upon mere conjecture. *Collins v. Hand*, 431 Pa. 378, 346 A.2d 398, 404 (1968). It is an abuse of discretion to admit an expert's opinion if it lacks an adequate factual basis. *Hussey v. May Department Stores, Inc.*, 238 Pa. Super. 431, 357 A.2d 635 (1976).

In support of his allegations regarding the alleged influence and control of U.S. Healthcare, petitioner produced an expert report authored by David L. Rhodes, M.D., an anesthesiologist. (R.957) Petitioner later attempted to substitute Dr. Bursztjan for Dr. Rhodes. The

trial court properly found that petitioner, regardless of which expert testified at trial, had failed to articulate genuine issues of material fact with respect to petitioner's allegation that HMO-related financial incentives influenced the medical care rendered to the decedent by Dr. Nicklin and University City Family Medicine.

Petitioner's expert, Dr. Rhodes, in a report dated December 3, 1997, offered the following opinions with respect to the alleged influence of HMO-related incentives:

> Since Dr. Nicklin's June 11, 1993 personal handwritten note in Pennsylvania Hospital's records quite candidly documents that Mrs. Lazorko's "major psych problems" were "well known" to him; that he knew she was "very depressed" and "wished to die," and further acknowledged that her current suicide attempt by overdose was not to be taken lightly – representing "quite significant risk of death," his medical training should have provided him with the knowledge that such a chronic and severe condition could not miraculously change overnight and that his discharge of Mrs. Lazorko the very next day, June 12, 1993, was grossly inappropriate.
>
> As much as it displeases me, *in light of Dr. Nicklin's handwritten note, I am ethically bound to conclude that his decision to discharge her in less than seventy-two hours when it was well known to him that she was chronically depressed and a suicide risk, must have been made by him because of either monetary restraints placed on his treatment regime by Pennsylvania Hospital and/or U.S. Healthcare/HMO PA-NJ and/or financial incentives offered to him for managing his practice in that manner.* (R.957)

Dr. Rhodes provides absolutely no support for his opinion that HMO-related financial incentives influenced the medical care provided by Dr. Nicklin and University City Family Medicine. Dr. Rhodes simply states, in conclusory fashion, that the decision to discharge the decedent must have been made by Dr. Nicklin because of "either monetary restraints placed on his treatment regime by Pennsylvania Hospital and/or U.S. Healthcare/HMO PA-NJ and/or financial incentives offered to him for managing his practice in that manner." (R.957) Because Dr. Rhodes' opinion is not grounded in fact, it amounts to nothing but pure speculation and does not constitute proper evidence.

Petitioner's expert, Dr. Bursztjan, in a report dated June 5, 2002, offers the following opinions with respect to the alleged influence of HMO-related incentives on the care rendered to the decedent by respondents:

> . . . Although the medical and insurance records are substantially incomplete there is substantial data to support the opinion that economic factors, including the influence and control exercised by a health maintenance organization (HMO), substantially influenced and controlled clinical decision making, the psychiatric care this patient and her family received, and the departures from the standard of psychiatric care. Therefore these are among the foreseeable medical causes of her eventual death by partially treated psychoses driven suicide. But for these medical causes her death by psychoses driven suicide was preventable. Specifically
>
> * * *
>
> I. There was a failure to educate and inform Mrs. Norlie-Lazorka's and her husband of

. . . the role of economic considerations in Mrs. Norlie Lazorko's premature hospital discharge.

J. . . . there is substantial data to support the opinion that economic factors, including the influence and control exercised by a health maintenance organization (HMO), substantially influenced and controlled clinical decision making, the psychiatric care this patient and her family received, and the departures from the standard of psychiatric care. This includes Dr. Lang's note of 7/31/92 stating "will recommend that HMO find inpatient facility for patient". (page 2 emergency evaluation), US Mental Health Systems Communication Log, Medical Admissions Notification Forms, Hospitalization Review Forms, Discharge Forms indicating substantial communication with the HMO, and oversight and control by the HMO of the patient's clinical status and care, and admission and discharge planning. Moreover the contractual arrangements between the HMO and the patient's primary care physician were of a capitation nature and likely to create the risk of conflict of interest between the primary care clinician and this patient.

K. The lack of care this patient and her family received is consistent with economic factors unduly influencing her care including US Behavioral oversight and control of her care, and the potential conflict of interest created by the HMO capitation scheme for the primary care physician.

L. The failure by the HMO or the treating clinicians to inform the patient and her family of the nature and extent of oversight, control and influence exercised by the HMO on her care, and the potential capitation scheme financial conflicts of

> interest limiting her care are in violation of the relevant AMA Code of Ethics sections, departures from the standard of care, . . . (SRR.8-10)

The medical records and other documents cited by Dr. Bursztjan in his expert report do not support his opinion that alleged HMO-related incentives influenced Dr. Nicklin and/or University City Family Medicine's care of the decedent.

Dr. Bursztjan cites to a note written by "Dr. Lang" in July 31, 1992 stating "will recommend that HMO find inpatient facility for patient." The care rendered to the decedent in 1992 is not relevant to this dispute. Furthermore, Dr. Lang is not an associate of Dr. Nicklin and/or University City Family Medicine and the note documenting his alleged plan is not contained within the office records of Dr. Nicklin or the records of Pennsylvania Hospital pertaining to the decedent's June 10, 1993 admission.

Dr. Bursztjan also cites to the U.S. Mental Health Systems Communication Log and Medical Admissions Notification Forms as evidence of HMO control and influence. The only documentation contained in the log pertaining to the June 1993 admission of the decedent to Pennsylvania Hospital is a one page document entitled "USMHS – Medical Admission Notification Form" which indicates only the facts of her admission and discharge plan. (R.1790) Dr. Bursztjan also cites to "Hospitalization Review Forms" and "Discharge Forms" indicating substantial communication with U.S. Healthcare and oversight and control by the HMO of the patient's admission clinical status and care, and admission and discharge planning. Dr. Nicklin and University City Family Medicine are aware only of a USHC Claims Report pertaining to the

decedent which contains only one entry pertaining to the June 10, 1993 admission. This entry simply documents a service date of June 10, 1993 (the decedent's emergency room visit) and indicates the amounts charged and paid by U.S. Healthcare to the provider. (R.1784) The U.S. Healthcare "Admissions for Member" form contains entries dated June 11, 1993 which appear to indicate that a representative of U.S. Healthcare spoke to Social Services, giving the telephone number for certain mental health interventions. (R.1450) The entries further set forth certain facts pertaining to the hospitalization. (R.1450) Finally, the Discharge Summary does not contain any information whatsoever concerning the decedent's health insurance. (R.1500) There is absolutely no evidence which even suggests that alleged HMO financial incentives influenced, in any way, the care rendered to the decedent by respondents.

Finally, Dr. Bursztjan does not state to a reasonable degree of medical certainty that the contractual arrangements between the HMO and Dr. Nicklin created a conflict of interest between himself and the decedent, resulting in the negligent delivery of health care services. Rather, Dr. Bursztjan states only that the contractual arrangements between the HMO and Dr. Nicklin were "likely" to create the risk of conflict of interest between Dr. Nicklin and the decedent. (SRR.9) Dr. Bursztjan does not identify what financial incentives allegedly motivated respondents to discharge the decedent, making only a vague reference to the "capitation nature" of the insurance plan. (SRR.9) The mere fact that an HMO may provide incentives to physicians to ration the provision of health care cannot support a claim of negligence or willful misconduct in the delivery of healthcare services. (*See Bordlemay v. Keystone Health Plans, Inc.*, 2001 Pa. Super. 381.)

Finally, Dr. Nicklin, at his deposition, testified that U.S. Healthcare did not control, direct or supervise his treatment of the decedent, that he never recommended any treatment which was denied or not approved by U.S. Healthcare, and that he did not consult with U.S. Healthcare on any of the treatment he provided to the decedent. (R.861) Dr. Nicklin also testified that there were no procedures or restrictions that he received from U.S. Healthcare that prevented him from rendering any treatments to the decedent or from ordering any treatments for her that he thought were necessary. (R.861) Finally, Dr. Nicklin testified that there was never a time that he did not provide treatment to the decedent because of the manner in which he was being reimbursed by U.S. Healthcare and that the treatment he provided to patients with U.S. Healthcare coverage did not differ in any way from the treatment he provided to "fee-for-services" patients. (R.862) Petitioner failed to produce any competent evidence to contradict Dr. Nicklin's testimony.

C. Even if this Court were to find that the reports of petitioner's experts, Dr. Rhodes and Dr. Bursztjan, were sufficient to create genuine issues of material fact with respect to the alleged negligence of Dr. Nicklin and University City Family Medicine, these respondents would still be entitled to prevail on their Motion for Summary Judgment since petitioner's experts were not qualified to express an opinion on the issue of Dr. Nicklin's alleged negligence.

The admission of expert testimony is within the discretion of the trial court. *Duquesne Light v. Woodland Hills School Dist.*, 700 A.2d 1038, 1047 (Pa. Commw.

1997). It has long been the law in Pennsylvania that the test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine. *Miller v. Brass Rail Tavern, Inc.*, 541 Pa. 474, 664 A.2d 525, 528 (1995).

Section 512 of Pennsylvania's Medical Care Availability and Reduction of Error (MCARE Act), provides, in pertinent part, as follows:

> (a) General rule. – No person shall be competent to offer an expert medical opinion in a medical professional liability action against a physician unless that person possesses sufficient education, training, knowledge and experience to provide credible, competent testimony and fulfills the additional qualifications set forth in this section as applicable.
>
> (b) Medical testimony. – An expert testifying on a medical matter, including the standard of care, risks and alternatives, causation and the nature and extent of the injury, must meet the following qualifications:
>
> (1) Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia.
>
> (2) Be engaged in, or retired within the previous five years from, active clinical practice or teaching . . .
>
> (c) *Standard of care. – In addition to the requirements set forth in subsections (a) and (b), an*

expert testifying as to a physician's standard of care also must meet the following qualifications:

(1) *Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.*

(2) *Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue, except as provided in subsection (d) or (e).*

(3) *In the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board, except as provided in subsection (e).*

* * *

(e) Otherwise adequate training, experience and knowledge. – A court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period. (A copy of Section 512 is attached hereto as Exhibit "A.")

Neither of petitioner's experts, Dr. Rhodes, an anesthesiologist, or Dr. Bursztjan, a psychiatrist, are qualified to render an opinion as to the standard of care owed by Dr. Nicklin, a family practitioner. Neither expert is board certified by the same or a similar approved board as Dr. Nicklin and neither practices in the same subspecialty as

Dr. Nicklin or in a subspecialty which has a substantially similar standard of care for the specific care at issue. Thus, both experts are precluded from offering an opinion at trial concerning their alleged breach of the standard of care.

II. Petitioner's newly disclosed expert, Harold J. Bursztjan, M.D., cannot fairly be considered to be a substitute for his former expert, David L. Rhodes, Sr., M.D.

Under Pennsylvania law, a substitute expert "stands in the shoes" of an expert who, for whatever reason, usually death or documented health problems, is unavailable to attend trial. Stated otherwise, a substitute expert's opinions should be consistent with, and not go beyond the scope of, the original expert's report. In addition, the operative facts relied upon by both experts to support their opinions should be substantially the same. Finally, a party cannot switch experts before trial without offering a compelling justification. *See Baselice v. Hasbrouck*, CCP. Phila., Feb. Term, 1995, No. 2557 (September 29, 1998), aff'd, Pa. Super. (December 22, 1999); *see also Beyer v. Epstein*, 33 Phila. 54 (1997).

Dr. Bursztjan cannot fairly be considered to be a substitute expert for Dr. Rhodes. First, Dr. Rhodes is an anesthesiologist while Dr. Bursztjan is a forensic psychiatrist. (R.187) Second, the theories of liability set forth in Dr. Bursztjan's expert report far exceed those set forth in the expert report of Dr. Rhodes. At the "repeat" argument, petitioner's counsel admitted that Dr. Bursztjan's report went beyond the scope of Dr. Rhodes' report. (R.3329-3330) Finally, the records on which the two experts relied to form their opinions differs dramatically. (R.957, SRR.3-5)

Because Dr. Bursztjan and Dr. Rhodes differ in their areas of expertise and the scope of their opinions, and because the operative facts relied upon by both experts to support their opinions are not substantially the same, Dr. Bursztjan cannot fairly be considered to be a "substitute" expert for Dr. Rhodes.

Furthermore, petitioner failed to offer a compelling justification for switching experts at "the eleventh hour." The only excuse petitioner offered for the sudden unavailability of Dr. Rhodes was that Dr. Rhodes had "moved out" and was no longer available to "testify in this capacity." (R.3328) At the hearing, petitioner did not produce an affidavit of Dr. Rhodes or any other evidence supporting his claim that Dr. Rhodes was no longer. Because petitioner failed to offer a compelling justification for switching experts at this late date, the trial court need not have even considered Dr. Bursztjan's report in ruling on the Motions for Summary Judgment.

III. The trial court did not err by implicitly finding that petitioner's contention that Dr. Nicklin destroyed evidence during the pendency of this litigation was without merit.

Spoliation is the intentional or negligent destruction of evidence. In *Schroeder v. Department of Transportation*, 551 Pa. 243, 710 A.2d 23 (Pa. 1998), our Supreme Court adopted the spoliation-of-evidence standards set forth by the Third Circuit Court of Appeals in *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76 (3d Cir. 1994). According to the Court in *Schmid*, the spoliation doctrine is broadly applicable to cases where "relevant evidence" has been lost or destroyed.

Throughout this litigation, petitioner has repeatedly accused Dr. Nicklin and University City Family Medicine of discarding documents relevant to his claim during the pendency of this litigation. Specifically petitioner has accused Dr. Nicklin of destroying his U.S. Healthcare file, including capitation lists, utilization reports, yearly evaluations and his contract with U.S. Healthcare, after he had been sued and after he had been served with discovery requesting these documents. During his deposition, Dr. Nicklin testified that he did not maintain a U.S. Healthcare file. (R.843-844) Further, Dr. Nicklin testified that he did not keep capitation lists and utilization reports after they became "years old" because they had no relevance to his practice. (R.844) Dr. Nicklin testified at deposition that he did not keep copies of the yearly performance evaluations he received from U.S. Healthcare but discarded them after reviewing them. (R.844) Finally, Dr. Nicklin testified that he kept his U.S. Healthcare contract for a period of time but hadn't had it for years.

Assuming arguendo, that petitioner could prove that Dr. Nicklin discarded relevant documents during the pendency of this litigation, he could not prove that he had been harmed. U.S. Healthcare produced a copy of its contract with Dr. Nicklin, (R.2297), its Claims Report pertaining to the decedent, along with the providers' charges and the amounts paid, (R.1783), its Member Admissions Report, (R.1786-1788), and its Mental Health Systems Records pertaining to the decedent. (R.1789-1812) Further, petitioner, himself, produced a copy of a U.S. Healthcare Primary Care Physician Agreement Execution, which includes a section on physician compensation. (R.455-465) Petitioner also produced a copy of a U.S. Healthcare Quality Care Compensation System Monthly

Sample Reporting Package which discusses capitation, physician compensation and utilization reports. (R.467-492) Accordingly, even if petitioner could prove that Dr. Nicklin destroyed documents relevant to this litigation during the course of the litigation, he could not have proven that he suffered any prejudice from Dr. Nicklin's alleged conduct since the documents have already been produced or are in the possession of U.S. Healthcare.

CONCLUSION

For the reasons set forth above, respondents, David E. Nicklin, M.D., and University City Family Medicine, respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

PETER J. HOFFMAN
ANN B. CAIRNS
McKISSOCK & HOFFMAN, P.C.
1818 Market Street, 13th Floor
Philadelphia, PA 19103
(215) 246-2100
Attorneys for Respondents,
David E. Nicklin, M.D. and
University City Family Medicine